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SUPREME COURT, U.S.

No. 81 6062

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

James M. Cochran,

Petitioners,

v.

United States of America

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that conviction under 18 U.S.C. § 1962(c) (RICO) does not require evidence that the enterprise alleged in the indictment benefited or was furthered by the alleged pattern of racketeering activity?

2. Did the Court of Appeals err in holding that miscitation in the indictment of the pertinent subsection of the Texas bribery statute alleged as a predicate offense under RICO did not constitute reversible error?

3. Did the Court of Appeal err in holding that the counts against defendant Cochran were prejudicially misjoined with a violation of civil rights count against defendant Welch in violation of Fed. R. Crim. Proc. Rule 14?

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No. 81 6062

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Tom Welch, Charles Cashell,
William L. Satterwhite and
James M. Cochran,

Petitioners,

v.

United States of America

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

The Petitioner, JAMES E. COCHRAN prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 21, 1981.

OPINION BELOW

The Order of the United States District Court for the Eastern District of Texas sentencing Petitioner is unreported.

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 656 F.2d 1039 (5th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 21, 1981, and rehearing was denied November 2, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. U.S. Const. amend. V provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. § 242 provides as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

3. 18 U.S.C. § 1511(a) provides as follows:

> (a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if--
>
> > (1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State of political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

4. 18 U.S.C. § 1961(1)(A), (4), and (5) provide as follows:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

5. 18 U.S.C. § 1962(c) provides in pertinent part as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

6. Fed. R. Crim. Pro. Rule 14 provides in pertinent part as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

7. Texas Penal Code § 36.02(a)(1) and (3) provide as follows:

> (a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

> (1) any pecuniary benefit as consideration for the recipient's . . . exercise of discretion as a public servant . . .
>
> (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official.

STATEMENT OF THE CASE

James M. Cochran, Petitioner herein, was a Deputy Sheriff in Gregg County, Texas from 1968 to 1976. On August 3, 1979, Cochran was charged by a Federal Grand Jury in a six count indictment. The first two counts were severed prior to trial, and Defendants Welch, Satterwhite, Cochran, Cashell, and Roach proceeded to trial on the remaining counts.

Count No. III charges violation of 18 U.S.C. § 1511 and alleges Welch, Satterwhite, Cochran, and a severed defendant, conspired to obstruct enforcement of the criminal laws of Texas with

the intent to facilitate an illegal gambling business.

Count No. IV, which did not charge Cochran, charges a violation of 18 U.S.C. § 1511 and alleges that Welch, Roach, Cashell, and a severed defendant, conspired to obstruct the enforcement of the criminal laws of Texas with the intent to facilitate an illegal gambling business.

Count No. V charges violation of 18 U.S.C. § 1962(c) alleging Welch, Satterwhite, Cochran, Roach, and Cashell conducted the affairs of an enterprise affecting inter-state commerce through a pattern of racketeering activity.

Count No. VI charges Welch with violation of the civil rights of a prisoner while incarcerated in violation of 18 U.S.C. § 242.

Trial was commenced, and Count VII was severed on the second day. After a twelve day trial, the jury returned a verdict of

"guilty" upon Count Nos. III, IV, and V against all defendants.

Upon return of the verdict, Welch was convicted on Count Nos. III and IV and was sentenced to two concurrent five (5) year terms, and convicted on Count V and sentenced to ten (10) years. Satterwhite was convicted as to Count Nos. III and V of the indictment and sentenced to two concurrent five (5) year terms. Cochran was convicted of Count Nos. III and V of the indictment and sentenced to two concurrent five (5) year terms. Cashell was convicted of Count Nos. IV and V of the indictment and sentenced to two concurrent three (3) year terms. Roach was convicted of Count Nos. IV and V of the indictment and sentenced to two concurrent five (5) year terms.

All defendants appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed all the convictions

except Satterwhite's conviction on Count V, which was reversed. Roach died pending that appeal.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) (18 U.S.C. § 1962(C)).

The decision below conflicts with decisions in the United States Courts of Appeal for the Fourth, Sixth, Seventh, and Eighth Circuits. The conflict revolves around the meaning of the word "through" in 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs <u>through</u> a pattern of racketeering activity or collection of unlawful debt (emphasis added).

Defendants were charged with conducting the affairs of the Gregg County, Texas Sheriff's Office through a pattern of racketeering activity. United States v. Welch, 656 F.2d 1039, 1050 (5th Cir. 1981). The court below held that all the government is required to show under the statute is "a relationship between the predicate offenses and the affairs of the enterprise." Id. at 1061. The court stated the government made such a showing by evidence of the defendants' receiving payments for refusing to enforce the law.

The "relationship" standard of the court below conflicts with the Fourth Circuit decision in United States v. Webster, 639 F.2d 174, 184-86 (4th Cir. 1981), the Seventh Circuit decision in United States v. Nerone, 563 F.2d 835, 851-52 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), and the Eighth Circuit decision in United States v. Anderson, 626

F.2d 1358, 1366-67 n.13 (8th Cir 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1351 (1981). Each of these circuits have held or noted that RICO convictions require more than "a relationship between the predicate offenses and the affairs of the enterprise." Welch, 656 F.2d at 1061.

The strongest declaration on the meaning of "through" in 18 U.S.C. § 1962(c) is the Fourth Circuit's opinion in Webster. After reviewing Nerone, United States v. Mandel, 591 F.2d 1347 (4th Cir.), vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980), and Anderson, the court held that the "prosecution must prove that the 'enterprise' had its affairs advanced or benefited in some fashion, direct or indirect, by the pattern of racketeering activity." 639 F.2d at 185-86. In Webster, the defendants operated a tavern and store and were charged with

using the business phone and location as a relay center for narcotics related messages. Id. at 183. The Fourth Circuit noted RICO addresses solely the conducting of affairs of the enterprise through and not conducting of racketeering through the enterprise. Since the government did not show the tavern was advanced or benefited by the pattern of racketeering, the Defendants' convictions under 18 U.S.C. § 1962(c) were reversed.

In the instant case, there was no showing of how the charged predicate offenses advanced or benefited the affairs of the Gregg County Sheriff's Department. The only argument that can legitimately be advanced is that some individuals used their power as law enforcement officers to further their own individual affairs.

The Seventh Circuit has also required a stronger connection between a pattern of racketeering and the affairs of the

enterprise. In Nerone, 563 F.2d 836, defendants operated a mobile home park through Maple Manor, Inc. There was also evidence that illegal gambling was conducted in the basement of the son of the corporation's major stockholder. Three of the defendants were directors of the corporation. In reviewing the RICO convictions of the defendants, the court stated that if the "word 'through' is to have operative meaning, the Government must offer some proof that the affairs of the charged enterprise were conducted through a pattern of racketeering activity." 568 F.2d at 851. Judge Pell brings out in Nerone the same defect which exists in this case.

> The problem with the Government's case, however, is that the indictment charged that the affairs of mobile home park corporation, not the casino operation, were conducted through a pattern of racketeering activity. It made no attempt to show that the proceeds of the casino operation were invested in

> (the mobile home park corporation). Nor did it endeavor to show that gambling revenues were used by or in any way channeled into the corporation or that persons charged were paid out of gambling revenues to perform services for Maple Manor.

Id. at 851. In the instant case, the government's approach to the facts is also reversed. Taking all facts alleged by the government as true, what occurred was that an association of Defendants conducted an enterprise unnamed in the indictment through a pattern of racketeering activity. There was no showing that the charged predicate offenses in any way furthered the goals, economic or otherwise, of the Sheriff's Department.

The Eighth Circuit has noted that in dealing with infiltration of a legitimate business, the element of operating "through" a pattern of racketeering imposes an additional limit on the use of RICO. Anderson, 626 F.2d at 1366 n.13.

Each of the decisions cited above have, in one form or another, interpreted RICO to require proof of a stronger connection than "a relation between the predicate offenses and the affairs of the enterprise."

The argument that the defendants used their authority for personal gain does not go to the issue of whether the Sheriff's Department operated through a pattern of racketeering activity. The Fourth, Sixth, Seventh, and Eighth Circuits' interpretation of the word "through" in RICO recognizes this crucial distinction. Without such a distinction, the word "through" has no operative meaning. Defendant Cochran respectfully requests this Court to grant writ of certiorari to resolve the conflict between these Circuits and the Fifth Circuit opinion below. The First Circuit's comments in United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), at Page 904 are particularly appropriate in the Court's consideration of this petition.

II. THE DECISION BELOW AFFIRMS DEFENDANTS' CONVICTION ON AN UNCONSTITUTIONALLY VAGUE BASIS.

A conviction under RICO requires a showing of commission of two predicate offenses set out in 18 U.S.C. § 1961(1). One of the charged predicate offenses was violation of Tex. Penal Code § 36.02(a)(1) which provides:

> (a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:
>
> > (1) any pecuniary benefit as consideration for the recipient's . . . exercise of discretion as a public servant . . .

The charged acts of bribery were not within the defendants' discretion to permit, rather the proper application section would have been § 36.02(a)(3) which provides:

> (a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

> (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official.

Therefore, the indictment did not properly charge the defendants, was defective and the conviction should be reversed.

The court below dismisses this argument by saying any "miscitation of the pertinent subsection of the Texas bribery statute did not constitute reversible error," because the purpose of state law is merely definitional to identify generally the kind of activity made illegal by RICO. 656 F.2d at 1058-59. RICO prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. Racketeering activity is defined in § 1961(1)(a) as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, dangerous drugs, which is chargeable under State law." If bribery in that provision means conduct generally understood to be

bribery, then the court's interpretation of RICO is unconstitutionally vague in violation of defendants' Fifth Amendment due process rights. See United States v. Culbert, 435 U.S. 371, 374 (1978); Connolly v. General Construction Co., 269 U.S. 385, 391 (1926). Defendants cannot constitutionally be held accountable for failure to disprove an uncharged predicate offense. Since the indictment charging the predicate offense was defective, defendants' RICO convictions should be reversed.

III. THE COUNTS AGAINST COCHRAN WERE PREJUDICIALLY JOINED WITH A CIVIL RIGHTS VIOLATION COUNT AGAINST WELCH.

Count VI of the indictment alleged a civil rights violation by Sheriff Welch. Before that count was severed out at the close of all the evidence, the prosecutor stated:

> "Count VI is a civil rights violation against Sheriff Welch

> only. We will show you, and prove to you, the events that happened at that particular time was that Sheriff Welch came in drunk to his office late one night and in the presence of two or more Deputies took his pistol to an unresisting prisoner, and slashed him about the face with the barrel, causing a vast amount of blood to be lost by the prisoner, in violation of the Civil Rights laws of the United States."

There were two deputies on trial with Welch: Cochran and Roach. The prosecutor's statement could leave no other impression except that Cochran and Roach were the two deputies who watched Welch. Such inference greatly prejudiced Cochran because it tainted him as participating in the pistol whipping of a prisoner. The joinder of this count against Welch with other counts against Cochran was so prejudicial as to entitle Cochran to relief under Rule 14 of the Federal Rule of Criminal Procedure, and the court's instruction regarding the statement could not remove the undue prejudice to defendant Cochran. Therefore, defendant

did not receive a fair and impartial trial and his convictions should be reversed.

CONCLUSION

The decision below represents a conflict between the U.S. Courts of Appeal regarding the meaning of the word "through" in 18 U.S.C. § 1962(c). By failing to require the Government to show some benefit flowing from the racketeering activity back to the enterprise, the court below has read the word "through" out of the statute. In addition, the conviction of defendant Cochran is violative of the Fifth Amendment because under opinion, the RICO predicate offenses are not defined. Finally, Cochran did not receive a fair and impartial trial because of misjoinder with a violation of civil rights count against defendant Welch. For these reasons, defendant Cochran respectfully prays this Court grant writ of certiorari and reverse the judgement below.

Respectfully submitted,

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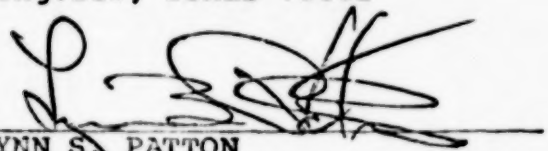
By: 

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